UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

ALBERT GRAY, Administrator, et al.	:	
Plaintiffs,	:	
vs.	:	C.A. No. 04-312-L
JEFFREY DERDERIAN, et al.	:	
Defendants.	:	

JOINT MOTION OF ANHEUSER-BUSCH, INC., ANHEUSER-BUSCH COMPANIES, INC., AND MCLAUGHLIN & MORAN, INC. FOR PHASED DISCOVERY AND ENTRY OF A SCHEDULING ORDER

NOW COME Defendants Anheuser-Busch, Inc., Anheuser-Busch Companies, Inc. and McLaughlin & Moran, Inc. (The "Moving Defendants") and move this Court for entry of a discovery scheduling order consistent with the accompanying memorandum of law.

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MEMORANDUM IN SUPPORT OF JOINT MOTION OF ANHEUSER-BUSCH, INC., ANHEUSER-BUSCH COMPANIES, INC., AND MCLAUGHLIN & MORAN, INC. FOR PHASED DISCOVERY AND ENTRY OF A SCHEDULING ORDER

INTRODUCTION

The litigation arising out of The Station fire in West Warwick, Rhode Island on February 20, 2003, has the potential for creating a discovery quagmire that could prevent defendants with meritorious threshold legal defenses from having them resolved in a timely and efficient manner. This Court presently has pending before it seven actions and two miscellaneous petitions all arising out of the fire. Nearly fifty different defendants have been sued by several hundred individuals (or their estates) who are alleged to have suffered personal injuries in the fire, as well as others who allege derivative claims. The defendants are alleged to have widely varying relationships to the tragic events of February 20. Some are alleged to have started the fire, owned the property, or created the fire hazard. Others, however, are more peripheral defendants, such as those who are alleged to have sponsored or promoted the

band's performance. The Moving Defendants -- Anheuser-Busch, Inc., Anheuser-Busch Companies, Inc. and McLaughlin & Moran, Inc.[1] -- fall into this latter category. After the stay of discovery is lifted on September 1, one challenge for this Court will be to meaningfully advance the progress of this case while avoiding a discovery quagmire that could infringe on the rights of some parties. The Moving Defendants believe they will have strong arguments for summary judgment, and they request that this Court adopt a phased approach to discovery as to them that will allow them to quickly have those arguments adjudicated. There are only two legal theories asserted against the Moving Defendants: negligence (alleged in all seven pending actions) and participation in a joint venture (alleged in five pending actions). These causes of action present case-dispositive legal issues that can be the subject of targeted discovery, such as: (1) did the defendants owe a legal duty in negligence to plaintiffs, and (2) were the defendants part of a joint venture? If the answer to these questions is "no," then the cases against the Moving Defendants must be dismissed.

A phased discovery approach will promote efficiency and economy and can ultimately assist the Court in narrowing the scope of this complex litigation. Focused discovery concerning the duty and joint venture issues could readily be completed in six months, at which time the Moving Defendants can then present this Court with dispositive motions.

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[1] All or some of the Moving Defendants have also been named in other Station fire-related actions and intend to bring a similar motion in those actions contemporaneously with the filing of their responsive pleadings. In addition, it is anticipated that other defendants facing similar "sponsorship" or "promotion" allegations intend to join this motion.

ARGUMENT

Courts and commentators alike encourage courts faced with complex litigation of this type to craft phased discovery plans that allow for the early resolution of case-dispositive issues. A court "enjoy[s] a broad measure of discretion in managing pre-trial affairs, including the conduct of discovery." *In re: Recticel Foam Corp.*, 859 F. 2d 1000, 1006 (1st Cir. 1988). The *Manual for Complex Litigation* recognizes the extraordinary burden on the parties arising from litigation of this type. Manual for Complex Litigation § 21.40 (3rd ed. 1995) *("MCL Third")* ("Discovery in complex litigation, characterized by multiple parties, difficult issues, voluminous evidence, and large numbers of witnesses, tends to proliferate, and become excessively costly, time consuming and burdensome."). In such cases, it is appropriate to "tailor case-management procedures to the needs of the particular litigation." *Manual for Complex Litigation* § 10.1 (4th ed. 2004) *("MCL Fourth")* (noting that judicial supervision at the early stages of complex litigation will lead to, among other things, "earlier dispositions" and "less wasteful activity").

"The Federal Rules of Civil Procedure, along with the court's inherent power to manage the litigation before it, provide ample authority" for such tailoring. *MCL Third* at § 21.40. Indeed, Rule 16(e)(12) authorizes a judge to adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal issues or unusual proof problems." Fed. R. Civ. P. 16(e)(12). Moreover, Rule 26(d) authorizes the court, upon motion, to alter the timing and sequencing of discovery "for the convenience of parties and witnesses and in the

interests of justice." Fed. R. Civ. P. 26(d); *see Chamberlain Group v. Interlogix, Inc.*, 2002 WL 467153, *5 (N.D. Ill. March 27, 2002).

Here, convenience and the interests of justice favor such sequencing because it will target the initial discovery "of information that may . . . provide a foundation for a dispositive motion." *MCL Fourth* at § 11.422. Plaintiffs assert primarily two theories of liability against the Moving Defendants. First, all Plaintiffs allege that the Moving Defendants either "sponsored" or "promoted" Great White's performance at The Station on February 20, 2003, and that such alleged sponsorship imposed some duty on them that, in turn, they performed negligently. In addition, certain Plaintiffs allege that such sponsorship or promotion was part of a joint venture, which included the Moving Defendants, as well as other named defendants. The Moving Defendants deny these allegations.

With respect to Plaintiffs' negligence claims, Rhode Island law is well settled that "a defendant cannot be liable under a negligence theory unless the defendant owes a duty to the plaintiff." *Carroll v. Yeaw*, 850 A.2d 90, 93 (R.I. 2004) (citations omitted). "If there is no duty owed the plaintiff there is no liability for harm caused." *Liu v. Striuli*, 36 F. Supp. 2d 452 (D.R.I. 1999). Thus, the threshold issue in any negligence action – including these actions -- is whether a defendant owes a plaintiff a duty of care. Whether a particular defendant owes such a duty is "purely a question of law, and the court alone is required to make this determination." *Yeaw*, 850 A.2d at 93; *see also Volpe v. Fleet Nat'l Bank*, 710 A.2d 661, 663 (R.I. 2003) ("Whether a duty of care runs from a defendant to a plaintiff is a question of law for the court to decide.").

Under Rhode Island law, a defendant who neither controls a premise nor the instrumentality of injury does not owe a duty of care to one who is injured. *Ferreira v. Strack*, 636 A.2d 682, 687 (R.I. 1994) ("We hold that the church did not owe plaintiffs, who were injured on a public way by an instrumentality not controlled by the church, a duty to control traffic.").[2] Here, the threshold issue for determining whether a duty exists is what amount of control, if any, the Moving Defendants exercised over The Station premises or the activities of the band Great White on February 20, 2003. This issue of control is also relevant to the claims of those plaintiffs who allege a joint venture because the existence of a joint venture depends upon each participant having an equal right of control over then venture. *See McAleer v. Smith*, 860 F. Supp. 924, 945 (D.R.I. 1994).

Focusing on the degree of control over the event, if any, is consistent with the well-established and substantial body of case law from other jurisdictions holding that "[g]enerally, a sponsor is not liable in negligence for injuries caused to event participants if the sponsor has no control over the event and is thus in no position to be able to prevent the injuries." *Lopresti v. City of Malden*, 1001 Mass. Super. LEXIS 197, *5 (Ma. Super. 2001); *see also Gragg v. Wichita State University*, 261 Kan. 1037, 1051 (Kan. 1997) ("no liability exists simply because one is a sponsor of a public event, absent some proof the sponsor had direct control over the hazardous conditions").

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[2] In determining whether a duty exists in a particular case, the court may also consider factors such as "the closeness of [the] connection between the defendant's conduct and the injury suffered," and "the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach." *Yeaw*, 850 A.2d at 93.

An order giving plaintiffs six months to complete all discovery relating to these threshold issues of duty and the existence of a joint venture, including what, if any, control the Moving Defendants exercised over The Station and/or the band Great White, will assist the Court in narrowing the scope of this complex litigation and serve "the convenience of the parties and witnesses and the interests of justice."[3] *See* Fed R. Civ. P. 26(d). First, such a schedule will allow the parties to discover information necessary for the Moving Defendants' early dispositive motions, which, if granted, will narrow the scope of the litigation. Moreover, if successful, the Moving Defendants can avoid costly and possibly irrelevant discovery as to other parties and claims. *See* Fed. R. Civ. P. 1 (stating that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action").

CONCLUSION

For the reasons set forth above, the Moving Defendants respectfully request that the Court enter an order phasing discovery in accordance with this Motion.

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[3] Such procedures are often adopted in complex litigation matters. For example, following the San Juan Dupont Plaza Hotel fire, hundreds of suits were filed against more than 200 defendants, all of which were consolidated in the United States District Court for the District of Puerto Rico before Judge Acosta. *See In re Allied Signal*, 891 F.2d 967, 968 (1st Cir. 1989). Judge Acosta adopted an extensive case management order that included phased discovery respecting different categories of defendants. *In re San Juan Dupont Plaza Hotel Fire Litigation*, 1988 WL 168401 (D.P.R. 1988); *see also, Datron v. CRA Holdings, Inc.*, 2000 WL 33709190 (W.D. Mich. 2000) (case management order limited "Phase I" discovery and dispositive motions to the temporal extent of defendant's liability for indemnification under Stock Purchase Agreement and potential liability as a parent corporation); *DMJ Assoc., LLC v. Capasso*, 228 F. Supp. 2d 223 (E.D.N.Y. 2002) (court entered case management order in a CERCLA case providing for phased discovery; Phase 1 focused on the nature and extent of contamination of property, phase 2 on the sources of alleged contamination, and phase 3 on remedies); *Angelico v. Lehigh Valley Hospital, Inc.*, 984 F. Supp. 308 (E.D. Pa. 1997) (case management order scheduling discovery and dispositive motions on issues of standing and injury prior to allowing discovery on all other issues).

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